IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 320.

THE DIAMOND MATCH COMPANY, *Appellants,*

vs.

THE VILLAGE OF ONTONAGON AND GEORGE DUCLEAU, TREASURER OF SAID VILLAGE, *Appellees.*

Appeal from the Circuit Court of the United States for the Western District of Michigan.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

In August, 1899, in the United States Circuit Court for the Western District of Michigan, Northern Division, the appellant filed its certain bill for injunction against the Village of Ontonagon, a municipal corporation in the County of Ontonagon and State of Michigan, and George Ducleau, its treasurer, and the Townships of McMillan and Ontonagon, in said County of Ontonagon.

The essential facts are, that in the years 1894-5, appellant was the owner of a large amount of pine timber lands situate upon the Ontonagon river and its tributaries in said County of Ontonagon. It was also the owner of extensive saw-mills, located near the mouth of

said river and within the limits of the Village of Ontonagon. It was the custom of appellant during the winter months to cut a sufficient amount of timber to keep its mills in operation during the following season. The annual capacity of these mills was some thirty or forty million feet of logs. The lands were situate on the waters of the Ontonagon river and its tributaries many miles beyond the municipal limits of either of the defendant municipalities, and the logs, when cut, were floated down the river to appellant's mills, and there manufactured into lumber, for the use of appellant in the regular prosecution of its business and for sale in open market. By reason of the frozen condition of the waters or the formation of ice in the river, logs could not be floated after about the first days of December until the first of May following, but were cut and placed upon the banks and in the bed of the river during the winter months, and made ready for transportation at the opening of navigation. During the summer of 1894 what is known as a forest fire extended over the lands of appellant, and for its preservation appellant was compelled to cut most of the timber and place it in the bed of the river and its tributaries, and during the winter of 1894-5 it did cut and place in said waters and upon the banks of the streams about 180,000,000 feet of logs preparatory for transportation to its mills near the mouth of the river.

Prior to the filing of this bill, and also prior to 1894, it had been the custom of the appellant and others engaged in similar business on the Ontonagon river, to prepare their logs during the winter months, floating the same down the streams when the water should be suitable, not in rafts, but promiscuously, in large quantities.

For the purpose of holding the logs that were floated down the river and to prevent their being carried by the high water into Lake Superior, appellant had constructed certain jam piers and booms about one mile above the mouth of the river, and beyond the municipal limits of both the Village and Township of Ontonagon. The mass of logs floated down the river during the spring freshets, or high water, were held by these appliances and passed through the jam piers and booms in quantities regulated by the capacity of the mills. The operation of the mills were annually closed about the first of December, and during the winter months, and until about the first of May following, there were practically no logs either in transit or in storage booms between the piers and the mouth of the river.

In May, 1899, appellant was the owner of about 30,000,000 feet of logs either in the Ontonagon river or its tributaries, or piled upon the banks of said river within the township of McMillan, but not within the limits or jurisdiction of either the Village or Township of Ontonagon. Upon these logs, the assessors, or other proper officers of each of the three municipalities, levied an assessment for taxation and made returns of the same to the proper statutory authorities. The assessed valuation for the Township of McMillan was fixed and returned at the sum of $10,000; for the Township and Village of Ontonagon, at $100,000 each, and upon these several valuations, taxes were assessed and levied for the following amounts: By the Township of McMillan about the sum of $1,000; by the Township of Ontonagon, about the sum of $3,000, and by the Village of Ontonagon, the sum of $6,750, and these several amounts were entered upon the assessment rolls against the appellant.

The Township of McMillan claimed the right to make this assessment and levy the tax, as upon property within the township on the second Monday of April, 1899, and the Village and Township of Ontonagon claimed the right to levy such assessment, as upon property in transit. Each of the municipalities claimed authority to levy the tax in controversy, under Section 14, Sub-division 8, Act Number 32, of the Laws of the State of Michigan of 1899, viz.:

> "Personal property of non-residents of the state, and all forest products owned by residents or non-residents or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage or warehouse where such property is situated in such township, on the second Monday of April of the year when the assessment is made, except that where such property is in transit to some place within the state it shall be assessed in such place, except that where such property is in transit to some place without the state it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any watercourse in or bordering on this state, then such assessment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit, and such property so in transit to any place without the state shall be assessed to the owner or person, persons or corporation in possession or control thereof, and in case such transit will pass said logs through the booms or sorting gaps, or into the places of storage of any person, persons or corporation operating upon any such stream, then such property may be assessed to such person, persons or corporation, and

the person, persons or corporation so assessed for any such property belonging to a non-resident of this state shall be entitled to recover from the owner of such property, by a suit in attachment, garnishment or for money had and received, any amount which the person, persons, or corporation so assessed is compelled to pay because of such assessment, and shall have a lien upon said property as security against loss or damage because of being so assessed for the property of another and may retain possession of such property until such lien is satisfied. Provided, further, that any owner or person interested in said property may secure the release of the same from such lien by giving to the person, persons, or corporation so assessed a bond in an amount double the probable tax to be assessed thereon, but not less than the sum of two hundred dollars ($200), with two sufficient securities, conditioned for the payment of such tax by such owner or person interested, and the saving of the person, persons, or corporation assessed from payment thereof, and from costs, damages and expense on account of his non-payment, which bond, as to amount and sufficiency of surety shall be approved by the county clerk of the county in which the assessment is made."

It further appears that in August, 1896, the appellant's mills at the mouth of the Ontonagon river were destroyed by fire and that thereafter its logs were floated down the river to the station or freight yards of the Chicago, Milwaukee & St. Paul Railway, near the mouth of the river, within the municipal limits of the Village of Ontonagon, and thence transported by said railway to appellant's mills, located at Green Bay, in the State of Wisconsin; this was the custom of appellant from and after August, 1896. The 30,000,000 feet of logs in controversy had been floated down the river to the jam piers or booms hereinbefore referred to prior to

the closing of the river in the fall of 1898, and were there held during the winter months, with the intention on the part of the appellant to resume the transportation to Green Bay after the opening of navigation. All of these logs had been either in or upon the banks of the river since the season of 1896. During the winter months it was impossible to float the logs from the jam piers or booms to the yards of the railway for transportation. The entire quantity of logs in controversy during the winter of 1898-9 were held by the frozen condition of the river above the jam piers, and within the municipal limits of the Township of McMillan, and were so held at the time of the assessment and levy in April, 1899.

Upon the filing of the bill, and after due consideration by the court, an interlocutory order was entered in said cause, restraining the three municipalities and their officers from collecting the taxes levied by each of the defendants, until the further order of the court. Subsequently, by stipulation of the parties, the bill of complaint was dismissed as against the defendants, the Township of Ontonagon and the Township of McMillan.

At the September term of court, A. D. 1900, the cause coming on for final hearing, upon the pleadings, stipulations of facts, and upon proofs, the court, after argument by counsel and due consideration, entered its final decree in said cause, dismissing said bill for want of equity.

The evidence which appears in this record has but little bearing, if any, upon the issues, as the stipulations of the parties were presumed to contain all the facts necessary for the final consideration of the cause. The last stipulation filed, which was intended to cover, not only

the preceding stipulations, but to embody all of the essential facts, is as follows:

"It is hereby further stipulated by and between the complainant and the defendants, Village of Ontonagon, and George Ducleau, its treasurer, that the following statements of fact are true, and may be used in evidence on the hearing of said cause by either of the parties to this stipulation, subject to objections for immateriality, to wit:

1. That the complainant is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in the City of Chicago, in said state; that it is engaged, and has been from the date of its organization, in the manufacture and sale of matches, and that in the prosecution of its business it purchased and became the owner of a large amount of pine-wood, timber, etc., situate on the Ontonagon river and its tributaries in Ontonagon County, and other counties in the State of Michigan, and that for many years prior to 1896, it owned and operated extensive saw-mills and plant near the mouth of the Ontonagon river, and within the corporate limits of the defendant Village of Ontonagon; that in its usual course of business, it cut or purchased a sufficient quantity of timber to supply its mills during the following season, not exceeding forty million feet, board measure, and placed the same during the winter upon and in said Ontonagon river and its tributaries, there to remain until the breaking up of the ice in said river in spring time, when they were and are driven down the river to the pier jams, booms and sorting grounds of the complainant, located above said mills and outside of the limits of the defendant, the Village of Ontonagon.

2. That in the summer of the year 1894, extensive forest fires swept over said pine lands of the complainant, and other pine lands, situate on said Ontonagon river, doing great damage to the timber

thereon; that in order to preserve the timber so injured by said fire, it became and was necessary to cut all of said timber and put the same into the waters of the above-named stream for preservation; that during the winter of 1894 and 1895, said complainant, in order to preserve said timber, was compelled to cut and did cut about one hundred and eighty million feet of logs and for the sole purpose of preservation placed the same in said river and its tributaries, there to remain until the complainant could float said logs down said river and streams to its mills to be manufactured into lumber; that it was not the intention or purpose of the complainant after the opening of navigation and during the season of 1896 to remove all of said logs, but only such amount as could be manufactured at its said mills during the season, and that the capacity of said mills did not exceed about the amount of forty million feet per annum, as hereinbefore stipulated.

3. That the navigation of said river and stream is closed by reason of the formation of ice about the first of December of each year, and is not open until after the first of May, following in each year.

4. That in the month of August, A. D. 1896, the complainant's said mills were destroyed by fire, and that thereafter it became necessary, and the complainant did transport said logs by the Chicago, Milwaukee & St. Paul Railway from Ontonagon to its saw-mills, located at Green Bay, in the State of Wisconsin. That in the regular prosecution of its business of manufacturing said logs into lumber, said complainant has not during any season since 1896 transported a larger quantity of said logs than it could manufacture into lumber at its mills at Green Bay, said quantity being on an average of less than forty million feet of logs, board measure.

5. That for the purpose of preserving said logs and preventing the same from floating down said river and into Lake Superior said complainant was compelled to and has utilized certain jam piers, booms and appurtenances, constructed by the plain-

tiff across said river, more than one mile above the mouth thereof, and beyond the limits of said Village of Ontonagon; that by reason of said appliances said logs have been held in said river and upon the banks thereof above said jam piers booms, etc., said complainant only passing through said piers such quantities as it could transport and manufacture into lumber at its said mills from time to time during each successive season since the year 1896; that during each successive season, it has been the usual and necessary practice of the complainant to pass through said piers, booms, etc., such quantities of logs as said Railway Company could furnish facilities for transportation, thence down the river to the place of delivery as described in paragraph 2 of another stipulation of facts made herein, to said Railway Company, to be loaded upon cars for transportation, and that said place of delivery was near the mouth of said river and within the corporate limits of said defendant, the Village of Ontonagon; that all of said logs so delivered to said Railway Company are transported over its lines to Green Bay, Wisconsin, leaving the State of Michigan at a point near the Village of Iron Mountain in said state.

6. That at the close of the season of 1898 the logs in controversy were held by said complainant and detained and preserved by said jam piers, booms, etc., in said Ontonagon river, above and beyond the limits of said defendant the Village of Ontonagon waiting the delivery for transportation, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire quantity cut and put in said river during the winter of 1895 and 1896, and had, since that date, been so held and detained by the complainant in its regular course of business; that all of said logs were so held and detained, and by reason of the ice in said river could not be floated down the same until about the middle of May, 1899, and that said logs so assessed, as charged in said bill of complaint,

were not, at the time said assessment was made, and on the second Monday of April, A. D. 1899, were not, except as stated in paragraph 4 of another stipulation herein, and never had been within the corporate limits of the said defendant, the Village of Ontonagon.

7. That the logs in controversy, at the time said assessment was made by said defendant, the Village of Ontonagon, were and had been for more than one year prior thereto in the manner above described, held and detained by the complainant within the municipal limits of the Township of McMillan in said County of Ontonagon, and were assessed for the purpose of levying a tax thereon, for the year 1899 by the proper officers of said Township of McMillan, claiming the right so to do under the general statutes and laws of the State of Michigan.

It is further stipulated and admitted by the parties to this stipulation that the assessment of the complainant's logs in controversy was not valid unless it should be held as a question of law, that the defendant, the Village of Ontonagon, had the legal right to assess said logs in said river outside and beyond the geographical limits of said village, as being in transit under the statutes of the State of Michigan in such case made and provided.

It is further stipulated:

That if the Village of Ontonagon was authorized by the laws of Michigan, at the time of the assessment and taxation by said village of which complaint is made, to assess and tax complainant for the logs in question, as being in transit, although outside the corporate limits of said village, the assessment actually made by it was not exorbitant or excessive as compared with the assessments of other property subject to assessment and taxation in said village.

Nothing herein contained shall be taken to admit the right of said village to assess for taxation against said complainant, or to tax its logs outside the corporate limits of said village."

The appellant prayed and perfected its appeal from the final decree, assigning as errors relied on, the following:

> "*First.* The Circuit Court of the United States for the Western District of Michigan, Northern Division, erred in holding that the statute of the State of Michigan, under and by auhority of which complainant's property was assessed for taxation, was not in contravention of, and repugnant to, Section 8 and Section 10 of Article 1, of the Constitution of the United States.
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> *Second.* The said Circuit Court erred in ordering and decreeing that the complainant's bill in said cause be dismissed for want of equity."

Points and Citations.

I.

THE VILLAGE OF ONTONAGON HAD NO POWER TO ASSESS PROPERTY FOR TAXATION AND LEVY TAXES THEREON, EXCEPT AS SPECIALLY CONFERRED BY THE GENERAL OR SPECIAL STATUTES OF THE STATE OF MICHIGAN.

Compiled Laws of Michigan, Vol. 1, page 913, Secs. 1, 2 and 6;

Cooley on Taxation, pp. 96, 209, 474;

Dillon's Municipal Corporations, 4th Ed., Sec. 763;

In re Second Avenue M. E. Church, 66 N. Y., 395;

Washington Avenue, 69 Pa. St., 352;

English v. *People of the State of Illinois*, 96 Ill., 566.

II.

THE STATE OF MICHIGAN COULD NOT BY LEGISLATIVE GRANT AUTHORIZE THE VILLAGE OF ONTONAGON TO IMPOSE A TAX UPON THE PROPERTY OF NON-RESIDENTS, WHEN THE SITUS OF SUCH PROPERTY WAS BEYOND ITS MUNICIPAL LIMITS AND JURISDICTION.

Wells v. *Weston*, 22 Mo., 384;

In the Matter of the Assessment of Lands, etc., 60 N. Y., 398;

Trigg v. *Glasgow*, 2 Bush, 594;

City of St. Louis v. *Ferry Company*, 11 Wall. 430.

III.

THE STATUTE OF THE STATE OF MICHIGAN, UNDER AND BY AUTHORITY OF WHICH THE COMPLAINANT'S PROPERTY WAS ASSESSED FOR TAXATION, IS IN CONTRAVENTION OF, AND REPUGNANT TO, THE CONSTITUTION OF THE UNITED STATES.

Coe v. *Errol*, 116 U. S., 517.
The Daniel Ball, 10 Wall, 557-565;
State Freight Tax, 15 Wall, 272.

IV.

UNDER THE ADMITTED FACTS, EQUITY HAS JURISDICTION TO ENJOIN THE COLLECTION OF THE TAX.

Cooley on Taxation, 2d Ed., p. 784;
Pacific Hotel Co. v. *Lieb*, 83 Ill., 602;
Railway Company v. *Cole*, 75 Ill., 591;
Cook County v. *Railroad Co.*, 35 Ill., 460;
Bank of Kentucky v. *Stone*, 88 Fed. Rep., 383;
Ogden City v. *Armstrong*, 168 U. S., 224;
High on Injunctions, Sec. 530;
Smyth v. *Ames*, 169 U. S., 515;
Hazard v. *O'Bannon*, 36 Fed. Rep., 855;
High on Injunctions, Sec. 502;
Parmalee v. *Railroad Companies*, 3 Dillon, 25.

ARGUMENT.

I.

THE VILLAGE OF ONTONAGON HAD NO POWER TO ASSESS PROPERTY FOR TAXATION AND LEVY TAXES THEREON, EXCEPT AS SPECIALLY CONFERRED BY THE GENERAL OR SPECIAL STATUTES OF THE STATE OF MICHIGAN.

It is admitted that the Village of Ontonagon was incorporated under the general statutes of the State of Michigan, with power to levy and collect taxes, as therein provided. The sections of the statute conferring this authority are made a part of the bill. (Trans., p. 4.) Defendants in error, in their answer to this bill, admit that the law of Michigan in force with respect to the assessment of the property in controversy is set forth with substantial accuracy in the bill of complaint. (Trans., p. 13.) Section 1 of the statute provides that:

> "The Common Council shall have authority to raise by general tax upon the real and personal property liable to taxation in said village such sum as they shall deem necessary for the purposes of defraying the general expenses and liabilities of the corporation, not exceeding in any one year one-fourth of one per cent. of the assessed value of such property."

The power of taxation conferred upon the village authorities by this statute, and to levy and collect taxes upon real and personal property, is confined to property located within the corporate limits of the village.

It is a well recognized rule, that all laws granting

municipalities the right to levy and collect taxes, must be construed with strictness—nothing is taken by implication.

In this jurisdiction the court is so familiar with the rule, that we shall cite but few authorities in its support.

In Cooley on Taxation, the learned author repeatedly emphasizes the principle. On page 96 he says:

> "As to municipal bodies it is conceded that they have no power to levy taxes unless it is specially conferred by the legislature. It is also conceded that any special authority must be strictly pursued or the action of the municipality under it will be invalid."

Again, on page 209:

> "In the construction of any grant of the power to tax made by the state to one of its municipalities, the rule which is accepted by all the authorities is, that it should be with strictness. The reasonable presumption is held to be, that the state has granted in clear and unmistakable terms, all that it has intended to grant at all; and whatsoever authority the municipal officers assume to exercise, they must be able to show the warrant for in the words of the grant. There is no inherent power in the municipalities to levy taxes; they can tax only as the state in its wisdom has thought proper to permit, and if the state has erred in the direction of strictness, the legislature alone can correct the evil."

Also, p. 474:

> "It has also been assumed that all local powers must have their origin in a grant by the state, which is the source and foundation of authority. The power to tax is no exception to this general rule. Every municipal corporation, and every political division of the state which demands taxes from the people must be able to show due authority from the state to make the demand. The authority in some

> cases conferred by the state constitution, but if not found there, it must be given by legislative enactment. No person is compellable to pay taxes for imposing which the authorities are unable to show a legislative grant of power."

To the same effect, Dillon's Municipal Corporations, 4th Ed. Sec., 763, to wit:

> "POWER TO TAX MUST BE PLAINLY CONFERRED. It is a principal universally declared and admitted, that municipal corporations levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred."

In re Second Avenue M. E. Church, 66 N. Y., 395, the court held, that

> "A municipal corporation, seeking to affect property within its jurisdiction by taxation or proceedings in the nature thereof, must produce express power therefor in legislative enactment, and must show that it has strictly followed all the legal requirements."

In Washington Avenue, 69 Pa. St., 352, the court, in its opinion discusses at length the whole theory of local taxation and the procedure which must be had in order to render the same constitutional, and holds that the power of taxation cannot be exercised, except by direct statutory authority.

Also, in *English* v. *The People of the State of Illinois*, 96 Ill., 566, the validity of a tax levied by the City of Joliet was the only matter under discussion or consideration. In the opinion by Mr. Justice SCHOLFIELD, the court adopts the rule of Judge Dillon, in his work on Municipal Corporations, above cited, and held, that

> "As municipal corporations can levy no taxes, general or special, unless the power be plainly and

unmistakably conferred, it devolves upon the people, on an application for judgment upon a city tax, to show that such tax has the sanction of law for its support."

Appellant denies the authority of the taxing officers of the Village of Ontonagon to assess its property for taxation, situate beyond its municipal limits. The village authorities had no jurisdiction over this property at the time the assessment was made. It was at the time situated within the municipal jurisdiction of the Township of McMillan, and was assessed by that township for taxation. The location of the property at the time the assessment was made, is admitted by the parties in the 6th and 7th paragraphs of their stipulation of facts, as follows (Trans., p. 27):

"6. That at the close of the season of 1898 the logs in controversy were held by said complainant and detained and preserved by said jam piers, booms, etc., in said Ontonagon river, above and beyond the limits of said defendant, the Village of Ontonagon, waiting the delivery for transportation, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire quantity cut and put in said river during the winter of 1895 and 1896, and had since that date been so held and detained by the complainant in its regular course of business; that all of said logs were so held and detained, and by reason of the ice in said river could not be floated down the same until about the middle of May, 1899, and that said logs so assessed as charged in said bill of complaint, were not at the time said assessment was made, and on the second Monday of April, A. D. 1899, were not, except as stated in paragraph 4 of another stipulation made herein, and never had been within the corporate limits of the said defendant, the Village of Ontonagon.

> "7. That the logs in controversy at the time said assessment was made by said defendant, The Village of Ontonagon, were and had been for more than one year prior thereto in the manner above described held and detained by the complainant within the municipal limits of the township of McMillan in said County of Ontonagon, and were assessed for the purpose of levying a tax thereon, for the year 1899, by the proper officers of said Township of McMillan, claiming the right so to do under the geneard statutes and laws of the State of Michigan."

Paragraph 6 of the stipulation is qualified by Paragraph 4 of another stipulation, made a part of the record. (Trans., p. 25. Paragraph 4 is as follows:

> "4. About five hundred thousand feet of complainant's said logs in said river have been (in said river or slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid."

Our contention is, that as the property in controversy at the time the assessment for taxation was made, was not and never had been within the municipal limits of the Village of Ontonagon, the alleged assessment was without statutory authority and wholly void.

II.

THE STATE OF MICHIGAN COULD NOT BY LEGISLATIVE GRANT, AUTHORIZE THE VILLAGE OF ONTONAGON TO IMPOSE A TAX UPON THE PROPERTY OF NON-RESIDENTS, WHEN THE SITUS OF SUCH PROPERTY WAS BEYOND ITS MUNICIPAL LIMITS AND JURISDICTION.

We have shown that at the time the assessment was made, the situs of the property assessed for taxation was not within the municipal limits of the Village of Ontonagon, and never had been within the jurisdiction of appellee.

It is a recognized axiom that the state itself has no right or power to impose taxes upon persons or property beyond the limits of the state; its sovereignty extends no further. The same principle limits the power of taxation of municipalities; it has no power to impose taxes upon persons or property beyond its limits; "its sovereignty extends no further."

The general principle underlying and authorizing all taxation is, that property should contribute to the support of the government that affords it protection. The property of the appellant, wherever situate in the State of Michigan, is protected by the laws and authorities of the state, but the Village of Ontonagon afforded no protection whatsoever to such property, and could afford no protection beyond the corporate limits of the municipality.

The precise question was argued and considered by the court in *Wells* v. *Weston*, 22 Mo., 384. This was a petition by Wells to set aside a sale of his land, made under the authority of the City of Weston, for the payment of a tax which the city claimed the right to levy and collect, and to enjoin execution of the deed. The charter of the city provided that inhabitants might own property either within or without city limits for burial purposes. Section 1 of Article 5 of the charter empowered the city to levy and collect taxes upon all property within city limits. The 36th section of the same article empowered the city to assess and collect a tax on all real estate without, and adjacent to the corporation, to the distance of one-half mile. Under this section of the charter the city levied a tax on all property within a half mile of the city. The plaintiff owned certain property

coming under this tax, and upon his refusal to pay the tax, the land was sold by the city collector. A demurrer to the plaintiff's bill was sustained and exception taken. In the opinion of the court it is said:

> "The question that has been argued before us upon this record, and the only one that we have considered is, whether it is competent for the legislature to confer upon the City of Weston authority to tax, for local purposes, land lying beyond the corporate limits. We have considered the matter with all the care that it is our duty to do, when we are required to decide upon the constitutional validity of a legislative act; but being clearly of opinion that this provision of the charter violates the constitutional rights of the citizen, which we are bound to protect, we are constrained to pronounce accordingly. * * *
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> "Although it be true, as a general proposition, that the legislature can not delegate their legislative power, but must exercise it themselves under their appropriate responsibilities; yet the practice of creating municipal corporations—with subordinate legislative power over the local affairs of the inhabitants, and, as incident to this, with authority to impose taxes upon the persons and things within the local jurisdiction in order to supply the local necessities, being firmly established, and daily practiced by our American governments when our constitution was adopted, must be considered as an ordinary legislative power, and one, of course, that our legislature may lawfully exercise. But no instance, it is believed, can be found where these corporations have been clothed with power to tax others not within their local jurisdiction for their own local purposes; and if the legislature possess the power, now claimed, over private property, they ought to exercise it themselves, and not delegate it to those whose interest it is to abuse it."

The essential facts are, that the complainant's logs assessed for taxation by the Village of Ontonagon for the year 1899 were at the date of the assessment as fixed by statute, located in other townships, and were assessed by the proper taxing officers of such townships. The appellant was, and is, a corporation of the State of Illinois, and was not, and could not be, a resident or citizen of the Village of Ontonagon.

The matter of the *Assessment of Lands in the Town of Flatbush, etc.*, 60 N. Y., 398, was an application by the commissioners of Prospect Park to have their assessment against the lands in the above town for the benefit of the park confirmed. The lands upon which the assessment was levied were situated in the town of Flatbush, beyond the limits of the City of Brooklyn, and it was contended that the assessment was unauthorized by law. The Court of Appeals held the assessment to be unauthorized and illegal, and in its opinion, among other things, said:

> "Had the respondents been originally assessed for benefit conferred under a proper law it might then be said that the assessment was for public use, and not for a subsisting debt, and such an assessment could have been enforced. But such is not this case. And those assessed are required, by the proceedings of the commissioners, to aid in the discharge of a debt previously contracted; and to contribute money which is to be paid into a sinking fund, and to be appropriated for the payment of bonds, already issued, for the location and improvement of the park. There is no principle, that I am aware of, which sanctions the doctrine that it is within the taxing power of the legislature to compel one town, city or locality to contribute to the payment of the debts of another. The government has no such authority, and this case is entirely without a precedent. If

such assessments were authorized they might not be limited to adjoining towns, cities or villages, but applied to those located at great distances from each other such legislation would be unjust, mischievous and oppressive, and cannot be tolerated. None of the acts in question, therefore, for the reason last stated, in any sense gave authority to the commissioners to impose the burden of the assessments made upon the town of Flatbush."

To the same effect, *Trigg* v. *Glasgow*, 2 Bush., 594.

Under charter of the Barren County Railroad, Glasgow subscribed $50,000. To pay for this Section 16 of the Glasgow charter provided: It shall be the duty of the trustees to levy an *ad valorem* tax on all property within said town, that is listed for state purposes, including the amount given in under the equalization law.

An amendment provided that all taxable property in said town shall be subject to taxation for payment of said subscription, and also all property which was removed from the town within a certain period of time for the purposes of evading taxation.

Trigg, a citizen of Glasgow, refused to list any property under the equalization law, but listed his other property in Glasgow at $5,000. The assessor on *ex parte* evidence increased the list $50,000, by adding mercantile interests in Louisville. This suit was brought to enjoin the collection of the supplemental tax.

The court held that the charter of the Village of Glasgow only authorized the taxation of property within its limits, and that complainant's property not situated in Glasgow was exempt from taxation, and enjoined the collection of the tax.

City of St. Louis v. *Ferry Company,* 11 Wall., 430.

This was an action for the recovery of taxes alleged to be due from the Ferry Company to the city. A statute of Missouri enacts that "shares of stock and all other interests held in steamboats, keel-boats, wharf-boats and all other vessels" shall be taxable for state purposes; and by its charter the City of St. Louis has authority to tax all property within the city so taxable.

In this state of statutory enactment the city authorities of St. Louis laid a tax on the value of all ferry-boats used by the Wiggins Ferry Company in ferrying passengers and cargo on the Mississippi river, between the City of St. Louis, Missouri, and East St. Louis, Illinois, on the opposite shore.

The ferry company was incorporated by the laws of Illinois, but had its principal office in St. Louis, Missouri. There its president, vice-president, treasurer, superintendent and other chief officers resided.

The ferry company refused to pay the tax, on the ground that these boats were not "property within the city."

The court, speaking by Mr. Justice SWAYNE, said:

> "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

III.

THE STATUTE OF THE STATE OF MICHIGAN, UNDER AND BY AUTHORITY OF WHICH COMPLAINANT'S PROPERTY WAS ASSESSED FOR TAXATION, IS IN CONTRAVENTION OF, AND REPUGNANT TO, SECTIONS 8 AND 10 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

In the court below the appellant challenged the validity of the state statute, under which appellees claim authority to levy the tax assessment in controversy, as being in contravention of the Constitution of the United States. (Trans., p. 18.)

The statute, referred to, enacted and in force on and after the 8th day of April, 1899, was copied into the bill and made a part of the record, to wit (Trans., p. 3):

> "Personal property of non-residents of the state, and all forest products owned by residents or non-residents, or estates of deceased persons, shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage or warehouse where such property is situated in such township, on the second Monday of April of the year when the assessment is made, except that where such property is in transit to some place within the state it shall be assessed in such place, except that where such property is in transit to some place without the state it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any water course in or bordering on this state, then such assessment shall be made at the

point where such property will naturally leave the state in the ordinary course of its transit, and such property so in transit to any place without the state shall be assessed to the owner or person, persons or corporation in possession or control thereof, and in case such transit will pass said logs through the booms or sorting gaps, or into the places of storage of any person, persons, or corporation operating upon any such stream, then such property may be assessed to such person, persons or corporation, and the person, persons or corporation so assessed for any such property belonging to a non-resident of this state shall be entitled to recover from the owner of such property, by a suit in attachment, garnishment, or for money had and received any amount which the person, persons or corporation so assessed is compelled to pay because of such assessment, and shall have a lien upon said property as security against loss or damage because of being so assessed for the property of another and may retain possession of such property until such lien is satisfied: Provided, further, that any owner or person interested in said property may secure the release of the same from such lien by giving to the person, persons or corporation so assessed a bond in an amount double the probable tax to be assessed thereon, but not less than the sum of two hundred dollars ($200) with two sufficient securities, conditioned for the payment of such tax by such owner or person interested, and the saving of the person, persons or corporation assessed from payment thereof, and from costs, damages and expense on account of his non-payment, which bond as to amount and sufficiency of surety shall be approved by the county clerk of the county in which the assessment is made."

This statute provides that personal property of non-residents of the state "and all forest products owned by residents or non-residents" shall be assessed in the township or ward where the same may be, to the person hav-

ing control of the premises, on the second Monday of April of the year when the assessment is made,—

> "except that where such property is in transit to some place within the state, it shall be assessed in such place. That where such property is in transit to some place without the state, it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof; *and in case the transit of any such property is to be other than through any water-course in or bordering on this state, then such assessment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit.*"

In the fourth paragraph of the stipulation of facts (Trans., p. 27), it is admitted that in the month of August, 1896, the complainant's mills at Ontonagon were destroyed by fire, and that thereafter it became necessary, and the complainant did transport said logs by the Chicago, Milwaukee & St. Paul Railway Company, from Ontonagon, to its saw-mills, located at Green Bay, in the State of Wisconsin. Also

> "that all of said logs so delivered to said Railway Company are transported over its lines to Green Bay, Wisconsin, leaving the State of Michigan at a point near the Village of Iron Mountain in said state."

Appellees claim the right to assess these logs under the section of the statute quoted as being in transit, and that they were assessable in the Village of Ontonagon, because they were there transferred from the Ontonagon river to the cars of the Railroad Company, and that this was appellant's last boom or sorting place for said logs.

The Circuit Court held, that:

> "For the purposes of taxation under this statute, the logs upon which this assessment was made were in transit from the time they were cut in the woods with the intention to have them transported to the complainant's mill at Green Bay, for manufacture, and were properly assessed at the Village of Ontonagon, that being 'the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof.'" (Trans., p. 21).

Evidently the learned chancellor overlooked the fact, admitted by the stipulation, that it was the intention of appellant to float the logs in controversy down the Ontonagon river for delivery to the Railroad Company, as soon as the condition of the water would permit, and that from Ontonagon they were to be transported by rail to Green Bay, leaving the State of Michigan at the Village of Iron Mountain.

After quoting the statute, the Circuit Court, in its opinion, said:

> "It is admitted by the parties to this suit, that the assessment was not valid unless, as a question of law, the Village of Ontonagon had the right to asess the logs which were in the river outside the limits of the village as being in transit under the statute of the State of Michigan above quoted." (Trans., p. 20.)

This statement finds support in the last paragraph of the stipulation of facts, to wit:

> "It is further stipulated and admitted by the parties to this stipulation, that the assessment of the complainant's logs in controversy was not valid, unless it should be held as a question of law, that the defendant, the Village of Ontonagon, had the legal

> right to assess said logs in said river outside and beyond the geographical limits of said village, as being in transit, under the statutes of the State of Michigan, in such case made and provided."

Under this stipulation and the opinion of the Circuit Court, it is apparent that the validity of this statute is the controlling question in this controversy.

The court held that it was bound by the construction of the statute, made "by the highest court of the State of Michigan," and cites *Elk Rapids Iron Company* v. *Township of Helena,* 117 Mich., 221, as controlling.

That was an action in assumpsit, by the Elk Rapids Iron Company against the Townships of Helena and Milton, to recover taxes paid under protest. The plaintiff was a manufacturing corporation, prosecuting its business in Elk Rapids, where its plant, stores, offices and place of business were located. It used annually a large amount of forest products, procured from the neighboring townships. The products were conveyed from these townships along streams and lakes to its plant in Elk Rapids. The timber was cut during the winter, placed upon the banks of the streams, and floated to Elk Rapids after the opening of navigation. Navigation commenced about May 1st. The authorities of Milton and Helena townships levied local taxes upon the property. The Iron Company, the owner of the property, claimed that under the statute the logs could not be assessed, except at Elk Rapids, the place of their destination. The taxes were paid under protest. In the trial court judgments were rendered for the defendants, but these judgments were reversed by the Supreme Court, where judgments were entered for the plaintiffs.

This case was decided by the Supreme Court of the State of Michigan in 1898. The statute that received the consideration and construction of the court was Section 15 of the Acts of 1893, which specially provided that all forest products in transit or on the banks or shore of any lake, pond, or stream, of this state shall be held to have a place of destination at the sorting grounds nearest the mouth of the stream, unless the contrary should be made to appear by the owner or party having the same in charge; and the court held in that case, that the logs in controversy were subject to taxation in the Township of Elk Rapids, their place of destination,—and were not subject to taxation in the townships where the logs were piled upon the banks of the stream awaiting a favorable condition of the water for transportation.

This statute was amended April, A. D. 1899, and the amended statute was in force at the time the assessment in controversy was made. The amended statute provides, that all forest products owned by residents or non-residents, shall be assessed in the township or ward where the same may be, to the person having control of the premises, except

> *"that where such property is in transit to some place within the state, it shall be assessed in such place,"*

and also the further exception,

> *"that where such property is in transit to some place without the state, it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state, in which said property will naturally be last floated during the transit thereof, and in case the transit of any such property is to be other than through any water-course in or bordering on this state, then such assess-*

ment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit, etc."

I am not aware that the Supreme Court of Michigan has put any construction upon this section of the statute, but it would seem to be the intention of the legislature, that property in transit to some place within the state should be assessed as of the place of destination; that if it is to be floated down the rivers or streams to a destination without the state, in such case the property should be assessed at the last boom or sorting gap of the stream in or bordering on the state. Also, if the property is to be transported without the state by any means of transportation, other than the water course, or partly by rail and partly by other methods of transportation, then the assessment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit.

It is admitted that all of the appellant's logs were to be floated down the river to a point within the Village of Ontonagon, where they were to be transferred from the stream to the cars of the Chicago, Milwaukee & St. Paul Railway Company, and from thence transported by rail to Green Bay, Wisconsin; that in the regular line of transit to Green Bay property would leave the state at a point near the Village of Iron Mountain in the State of Michigan, and it would therefore seem under this statute, the property in transit, if assessed at all, should have been assessed in the Village of Iron Mountain.

We believe that the court erred in its construction of the statute of 1899, and its application to the matters in controversy. Relative to our contention that the statute,

so far as it authorizes the assessment of property in transit from a point within the State of Michigan to a place without the state, is repugnant to the Constitution of the United States, the Circuit Court said:

> "It is contended by the complainant that if these logs were in transit then they are the subject of inter-state commerce and not taxable by the state authorities. I think, under the construction of the statute by the Supreme Court of Michigan, these logs were in transit at the time the assessment was made for the purpose of taxation, but not in the sense used in those judgments holding property to be the subject of inter-state commerce within the meaning of the federal constitution and acts of Congress. The Supreme Court of Michigan holds that for the purpose of taxation when logs are cut with the intention of transporting them, they are in transit, but there is no case holding that the mere intention to ship property where no act has been done looking to its actual transportation, would make such property a subject of interstate commerce. Under the facts in this case these logs would not be a subject of inter-state commerce until they were taken from the boom or sorting gap for the purpose of loading them on the cars for transportation to the mills of complainant at Green Bay." (Trans., p. 21.)

Under the admitted facts both the river and the railroad were utilized in the transportation of the logs from the Township of McMillan and other points on the Ontonagon river, to Green Bay, in the State of Wisconsin. Had the Ontonagon river extended to Green Bay, or to the state line, then, under the statute, the logs would have been assessable at the place in the State of Michigan "nearest the last boom or sorting gap of the stream in or bordering on the state," and in such case there can be no question that the property would be a subject of inter-state commerce. But in this case, the property was not

in transit through "any water-course in or bordering on this state," but, on the contrary, its transportation was down the river to a point within the Village of Ontonagon and thence transferred to the railroad, and, therefore, if assessable at all within the State of Michigan, it would be "at the point where such property naturally left the state in the ordinary course of its transit."

The movement of this property commenced with the opening of navigation of the river, and from that date it was a continuous transit until it reached its place of destination at Green Bay, and during its entire transit was a subject of interstate commerce, whether the transit was by water, or by railroad, or both water and railroad.

We have said that the statute of 1899 has not been before the Supreme Court of Michigan for construction. The precise question, however, was involved in the case of the *City of Menominee* v. *The Menominee River Boom Company*, in the Circuit Court of Menominee County and decided during the past year. In that case the logs were floated down the river, passing through the City of Marinette, Wisconsin. The city assessed the property to the Boom Company under the statute of 1899. The Boom Company denied the validity of the assessment, claiming that the property was in transit to a point without the state, was the subject of interstate commerce, and that the law of 1899 in that respect was repugnant to the Constitution of the United States.

The opinion of the court is as follows:

> "I shall not spend much time in disposing of this case. I think the Circuit Court ought not to be hasty in passing upon statutes and holding them to be unconstitutional; and it is only in a very clear case where I think the court ought to take that responsibility, ordinarily passing the matter along to the Supreme Court.

But when we come to consider that the Constitution of the United States is the supreme law of the land, any state constitution or law to the contrary, notwithstanding; and a provision of the statute is in direct conflict with the constitution, wherein it attempts to tax commerce, it seems to me that the court ought not to hesitate.

This case, by the proof, is brought within this category; that the logs were, on the second Monday of April, in transit in the rivers of this state to a point outside of the state, by a continuous route, down the Menominee river and its tributaries.

Now this statute provides that 'Personal property of non-residents * * * except that where such property is in transit to some place within the state it shall be assessed in such place.'

Then comes the provision, 'except where such property is in transit to some place without the state * * * in the ordinary course of its transit,' etc.

I think that the plaintiff is bound by the proposition that this property was in transit at the time of the assessment. That being the fact, it was governed by the interstate commerce rules and regulations and was non-taxable here. That this property may, as a matter of fact, have been situated at a point in this state where it might have been properly assessed in this state, in the township where it was situated, may be true. But that is not the position here which the plaintiff is bound to take, by the assessment roll and other proof, and by the stipulations in the case.

I think there is a great deal of force, too, in saying that you cannot assess property to this Boom Company here that has not yet reached it, being in transit. It is different from the proposition of the Company having the possession of property, in its mill, dock, yard, etc., where the property may be assessed to such persons, they having a right to pay the tax on the property in their possession and under their control, on which they may have a lien and hold it for their lien. But so far as the proof shows

> these logs may not even have reached the jurisdiction of this Boom Company at this time. They are simply in transit to a place without the state. I think the statute is unconstitutional and void. That has been my opinion from the start, and I shall so hold until the Supreme Court sets us right."

The streams of northern Michigan are extensively used for the transportation of forest products to points within and points without the state, and while the opinion in the Menominee case is not a judicial authority, still it is a construction put upon the statute of 1899 by a court of northern Michigan, familiar with this method of transportation, and of the rights of the parties under the statute.

The Circuit Court held that "under the facts in this case, these logs would not be a subject of interstate commerce until they were taken from the boom or sorting gap for the purpose of loading them on the cars for transportation to the mills of the complainant at Green Bay," and cites in support of this contention *Coe* v. *Errol*, 116 U. S., 517. We do not think this case supports the opinion of the Circuit Court. In the case cited the plaintiff filed a petition in the Supreme Court of New Hampshire against the Town of Errol for an abatement of taxes.

The facts were, that the plaintiff was the owner of a large number of spruce logs that during the winter had been placed in Clear Stream and on the banks thereof, in the Town of Errol, to be thence floated down the Androscoggin river to the State of Maine to be manufactured and sold. These logs were assessed in the Town of Errol for taxation at $6,000. There was another lot of logs belonging to the plaintiff, which had been cut in the

State of Maine and were on their way of being floated to Lewiston, Maine, but were detained in the Town of Errol by low water. These logs were also assessed for taxation by the officers of the Town of Errol; they were also assessed to the plaintiffs, as stock in trade at the Town of Lewiston. The State Supreme Court of New Hampshire held that the tax assessed upon logs cut in the State of Maine should be abated, and that the tax assessed upon logs cut in the State of New Hampshire, and placed on the banks of the river in the Township of Errol, should be sustained. The case was brought to this court on writ of error to the Supreme Court of the State of New Hampshire. Mr. Justice BRADLEY, speaking for the court, said:

> "The question for us to consider, therefore, is, whether the products of a state (in this case timber cut in its forests) are liable to be taxed like other property within the state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another state." (p. 524.)
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> * * * * *
>
> This question does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the constitution. *And so, we think, would the goods in question be when actually started in the course of transportation to another state or delivered to a carrier for such transportation.*"

It is here held that if the goods are actually started in the course of transportation to another state, then

they will become the subjects of interstate commerce, and the material question in the Errol case was, whether the goods had as a matter of fact, started in the course of transportation; if so, they are "under the protection of the Constitution."

The error of the Circuit Court was in holding that the logs in controversy could not be subject of interstate commerce until they were received from the river for transportation to the mills of the complainant. It is admitted in this case, as a fact, that complainant's logs were actually started in the course of transportation to Green Bay, at a point on the Ontonagon river beyond the municipal limits of the Village of Ontonagon, and were floated down to the yards, and there delivered to the Railway Company for the balance of the transportation.

It is further admitted that these logs were, as a matter of fact, in transit, and therefore the defendants claimed the right to assess the logs for taxation; otherwise, under the facts, there could be no pretense for this tax assessment.

In the *Errol* case, the essential question was, whether the property was actually in transit or not, while in the case at bar it is admitted that the property was in transit,

[redacted]

Mr. Justice BRADLEY further said:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common

> carrier for transportation out of the state to the state of their destination, *or have started on their ultimate passage to that state.*

In the present case the logs had started on their ultimate passage in the course of transportation, before this assessment was made, and in their regular course of transportation simply passed through the precincts of the Village of Ontonagon.

On page 526 it is further said:

> "Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding."

In the case at bar the complainant's logs were not assessed in the usual way for the reason that at the date of the assessment they were not within the corporate limits of the Village of Ontonagon, and therefore were assessed because of 'their anticipated departure' from the Township of McMillan to Green Bay, Wisconsin, passing through the Village of Ontonagon. This court was careful to draw a distinction between property held by its owner, intended for exportation, and property actually in motion by due course of transportation to some point or place without the state, and cites with approval

the case of *The Daniel Ball,* 10 Wall., 557-565, wherein it is said:

> "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

In the case, *supra,* the court further said:

> "The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

And in the case of the *State Freight Tax,* 15 Wall., 272, this court said:

> "It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid."

The agency adopted by the complainant for the transportation of its property to Green Bay was the navigation of the river so far as practicable, and thence by railway to the place of destination, and under the method adopted the property was in transit from the time it left the boom above the jam piers, situate in the Township of McMillan. By stipulation of the parties, this essential fact is admitted, and upon this theory the case was submitted to the Circuit Court. The tax was levied under the section of the statute authorizing the assessment of property for taxation while in transit to some place without the State of Michigan. So much of the statute as attempts to confer such authority, we respectfully submit, is repugnant to the Constitution, and therefore the tax levy here complained of is wholly void.

IV.

UNDER THE ADMITTED FACTS, EQUITY HAS JURISDICTION TO ENJOIN THE COLLECTION OF THE TAX.

The jurisdiction of the Assessor of the Village of Ontonagon to assess property for taxation did not in any case extend beyond the limits of the municipality, nor had he authority to assess complainant's property as in transit from a place within the Township of McMillan, in the State of Michigan, to Green Bay, in the State of Wisconsin, and therefore the levy of the tax and such assessment was not merely voidable, but, on the contrary, was absolutely void, and in law was a fraud upon the complainant. Equity has jurisdiction to enjoin the collection of a void tax.

In Cooley on Taxation, 2d Ed., p. 784, under the title of "Taxation of Personal Property," the learned author says:

> "A tax founded on a fraudulent assessment will be enjoined. An assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper motive, but if it is purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons, or through the adoption of a rule which is designed to operate unequally upon a class and to violate the constitutional rule of uniformity, the case is a plain one for the equitable remedy by injunction. So in any case in which a tax is rendered unequal or unfair by fraudulent or reckless conduct of officers, or in which the party is deprived by like practices of important rights which the law intends to secure to him; such, for instance, as the right of appeal from an assessment or to be heard by the

board of review before his assessment should be raised. But mere irregularities in the proceedings of tax officers do not make out fraud, or even give evidence of it. And fraud must be alleged and proved. All presumptions are against it." Citing:

Pacific, etc., Co. v. *Lieb,* 83 Ill., 602.

Gage v. *Evans,* 90 Ill., 569.

Chicago, etc., R. Co. v. *Cole,* 75 Ill., 591.

Ottawa, etc., Co. v. *McCaleb,* 81 Ill., 556.

Referring to the Illinois cases cited by the author, we call the court's attention to *Pacific Hotel Co.* v. *Lieb,* 83 Ill., 602.

This was a bill in equity to enjoin the collection of taxes levied upon the personal property of the complainant. We quote from the syllabus:

"Owing to the diversity of opinion as to the value of property, it has always been held that a court of equity will not interfere to enjoin the collection of a tax merely because the property has been assessed at a greater value than the court would have fixed upon it, but if the valuation is so grossly excessive as to furnish evidence of fraud on the part of the officer or body making the same, the court will interpose."

On page 609 the court says:

"Where, however, the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation—must reasonably have known that it was excessive—it is accepted as evidence of a fraud upon his part against the taxpayer and the court will interpose."

Here the collection of a fraudulently excessive tax was enjoined.

In the case at bar the officers departed entirely from their jurisdiction, assessed property of a non-resident

situate beyond the limits of the municipality, as being in transit to a place without the state, and therefore it follows as a conclusion of law that the entire assessment was void and a fraud upon the complainant.

In *Railway Co.* v. *Cole,* 75 Ill., 591, *supra,* the court held that whenever the Board of Assessors undertakes to go beyond its jurisdiction, it becomes the duty of courts to interfere and protect taxpayers against the consequences of such acts. Where jurisdiction is conceded, no mere difference of opinion as to the reasonableness of its valuations will justify equitable interference.

The learned author of Cooley on Taxation, page 761, says:

> "That there are certain cases with which the courts of law cannot adequately deal, cases of fraud, accident or mistake, and cases of cloud upon the title to one's property are also cases with which equity can most effectually deal, and it takes jurisdiction in tax cases, as it does in all others where any one of these grounds of jurisdiction appears. There are cases also in which equity on a single record might dispose of controversies which at law would require a multiplicity of suits; and this fact may furnish ample ground for equitable jurisdiction; for both the public and the parties concerned are interested in avoiding unnecessary litigation."

In support of the text the author cites, among other cases, *Cook County* v. *Railroad Co.,* 35 Il., 460.

In that case the complainant's rolling stock was assessed for taxation within the County of Cook. The bill averred that the company had no railroad within the limits of Cook County, nor did it operate any railroad to or within the limits of Cook County. The bill prayed a perpetual injunction that the tax might be de-

clared illegal and void, and for general relief. The court overruled the demurrer filed to the bill and decreed that the collection of the tax assessed should be perpetually enjoined.

Ogden City v. *Armstrong*, 168 U. S., 224:

This was a bill filed to enjoin the collection of a tax levied by the authorities of Ogden City upon the property of complainants. Mr. Justice Shiras delivered the opinion of the court. At page 233 it is said:

> "Upon the merits the first and most important question to consider is whether the city council had jurisdiction to assess and collect the paving tax."

It appears from the opinion, (page 240,) that the session laws of Utah provided that any party feeling aggrieved may pay the taxes levied under protest and bring his civil action at law to recover back the taxes so paid. Relative to this statute the court said:

> "As respects this contention, we agree with the Supreme Court of the Territory that this statute applies to cases where there are only errors, irregularities, over-valuations or other defects which are not jurisdictional, but that where the council not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this case, the statute and its remedies for errors and irregularities have no application."

So in the case at bar, if the assessor had no jurisdiction to assess the logs in controversy, his official action relative thereto would be wholly void for want of statutory power, and if, in pursuance of such void assessment the taxes should be assessed, the whole proceeding of the municipal officers could be enjoined.

Bank of Kentucky v. *Stone,* Sixth Circuit Court of Appeals, 88 Fed. Rep., 383, is an especially carefully considered case upon the proposition now under discussion. The personnel of the court was Mr. Justice Harlan, Taft and Lurton, the opinion by Judge Taft. The court recognized the general rule and held that:

> "It is well settled that in the Federal Courts an action at equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void and independently of every other consideration." (p. 390.) * * * "To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." (p. 391.)

Osborne v. *Bank,* 9 Wheaton, 738, is cited as authority for the conclusion of the court. In that case Chief Justice Marshall said:

> "The single act of levying the tax in the first instance is cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege."

High on Injunctions, Sec. 530, is also cited with approval. This section is as follows:

> "An important exception to the general doctrine of non-interference by injunction against the collection of the revenue because of illegality of the tax, is recognized in that class of cases where the relief is sought against a tax assessed upon property which has been exempted by law from taxation. Indeed, the exception has been so uniformly recognized as to become of itself a governing rule in the class of cases now under consideration. And it may be laid down as the established doctrine of the courts that

> the attempted enforcement of a tax upon property which has been exempted by proper legislative authority from the burdens of taxation, constitutes a grievance of so irreparable a nature as to merit preventative relief by injunction." Citing in support of the text a large number of decisions of the Supreme Court of the several states, including that of Michigan.

Applying these authorities and principles to the admitted facts in the present case, there would seem to be no possible doubt of the jurisdiction of equity to enjoin the collection of this tax. The property at the time the assessment was made and the tax levied, being beyond the corporate limits of the Village of Ontonagon, the law exempts such property from taxation by the municipal authorities. Also, as in *Osborne* v. *Bank, supra,* an action at law could not afford a remedy, except for the tax in controversy, and would not prevent a repetition of a similar annual assessment and levy. The defendants claim the legal right to levy this tax upon the property in transit without reference to its location, whether within or beyond the municipal limits. To deny the complainant relief in equity and require it to pay annually a void tax upon a void assessment, with no other remedy than an action at law to recover back the amount so unlawfully collected, would seem to be contrary to the principles of equity and chancery practice.

In *Smyth* v. *Ames,* 169 U. S., 515, it was contended that the plaintiffs had an adequate remedy at law and that the Circuit Court of the United States, sitting in equity, was therefore without jurisdiction. It was claimed that because the statutes of Nebraska expressly gave the plaintiffs a complete remedy in actions at law

that such statute took from the Circuit Court of the United States its equity jurisdiction. The court, however, held that a party

> "who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue in law in a state court, on the same cause of action." (p. 516.)

In *Hazard* v. *O'Bannon*, 36 Fed. Rep., 855, it is held that an injunction may be granted to restrain the collection of a tax imposed on property that is not subject to taxation, because it lies outside of the taxing district. In support of this proposition cases from the Supreme Court reports of Missouri are cited, but the court holds that

> "these decisions are in harmony with the general rule that prevails elsewhere, that the collection of a tax may be restrained if it is based upon an assessment that is clearly void."

In *High on Injunctions*, Section 502, the author says:

> "A distinction is drawn between cases of an irregular exercise of the taxing power or of an informal assessment and levy, and cases where there is an entire absence of any exercise of the power, and hence no valid assessment or levy. And in the latter class of cases, there being no exercise of the taxing power, what appears upon the tax records as a tax is illegal and void and its enforcement may be enjoined. So if there is a total want of authority to levy the tax, relief by injunction may properly be allowed."

The text is supported by the citation of a large number of cases in courts of undoubted authority.

It appears also that the rule of non-interference by equity is relaxed as to municipal corporations. We quote from Section 536 of High on Injunctions:

> "It will be found upon examination that courts of equity have been inclined in cases of assessments by municipal corporations to relax somewhat the stringency of the rule of non-interference as applied to the collection of state taxes, and relief by injunction has been more freely granted against the collection of municipal taxes than in cases affecting the collection of revenues by the state. And while it is difficult to perceive any sufficient reason for such distinction, the distinction itself remains. Thus, it is held that the general rule denying relief in equity against the collection of an illegal tax, in the absence of special circumstances bringing the case within some recognized head of equity jurisdiction, applies only to taxes levied by the sovereign, and not to taxes or assessments imposed by inferior bodies, such as municipal corporations."

Parmalee v. *Railroad Companies,* 3 Dillon, 25, was a bill in equity to restrain the collection of certain state, county and municipal taxes on account of an excessive and exorbitant valuation of the property alleged to have been illegally and improperly made by the State Board of Equalization, without jurisdiction. The personnel of the court was Mr. Justice Miller and Circuit Judges Dillon and Treat. Mr. Justice Miller in his opinion said:

> "It certainly cannot be denied that these various forms of municipal taxes by communities and cities and in townships are exercised by a class of men who are not very familiar with the laws under which they proceed; and to say the least of it, are not always observant of the rights of all parties interested in the taxation, and who do not always use the proceeds of that taxation either in the wisest manner or in the manner in which the law peremptorily declares they shall be used; and so for these reasons it would seem, looking at the general nature of the subject, that it ought to be within the power of some judicial body to arrest any unlawful proceeding in the levy

> and collection of taxes, and that no great harm would come in dealing with such bodies as they are, in subjecting them occasionally to the wholesome restraint of judicial proceedings when they are levying their taxes upon the people and disbursing them in ways which are not warranted by the law."

Under all the authorities, so far as we have been able to make a personal examination, it would seem that the facts of the case now presented to the court authorize the interposition of equity by injunction, and that the complainant has no other remedy equally efficient and adequate.

It is admitted by the parties that the tax was assessed upon complainant's property "as being in transit to some place without the state," and it is claimed that the Statute of 1899 is authority for this levy or assessment. There is no claim, or pretense, that the assessment could be made under any other statute, so that the controlling question is, whether the provision of the statute referred to is invalid as being repugnant to the Constitution of the United States.

The question is of very considerable importance to many business interests in Northern Michigan, where forest products are extensively transported to places without the state, either by navigation upon the rivers or streams, or by other methods of transportation, and it is within our knowledge that other cases involving the validity of this statute are now pending and held by the State Court until this court shall pass upon the validity of the statute.

In the court below, as here, appellant claimed that the state statute upon which the assessment necessarily

depended in whole, or in part, was in contravention of the Constitution of the United States, and hence the appeal direct to this court.

Respectfully submitted.

EDWIN WALKER,
Solicitor for Appellant.